Supreme Court, U.S.
FILED
DEC 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-462

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF
SCOTT PAPER COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF FOR PETITIONER

MARK BROOKS
(Counsel of Record)
UNITED PAPERWORKERS
INTERNATIONAL UNION
P.O. Box 1475
Nashville, Tennessee 37202
(615) 834-8590

LAURENCE GOLD
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
STEPHEN P. SUNENBLICK
P.O. Box 7060, DTS
97 India Street
Portland, Maine 04112

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

AT&T Technologies v. Communications Workers, 475 U.S. 643 (1986) 7
Berklee College of Music v. Berklee Chapter of the Mass. Federation of Teachers, 858 F.2d 31 (1st Cir. 1988) 2
Dobbs Inc. v. Local 614, International Brotherhood of Teamsters, 813 F.2d 85 (6th Cir. 1987) 4
Electrical Workers v. Litton, 704 F.2d 393 (8th Cir. 1983) 5
Ethyl Corp. v. Steelworkers, 768 F.2d 180 (7th Cir. 1985) 5
Ford Motor Co. v. Plant Protection Association, 776 F.2d 69 (6th Cir. 1985) 5
Highlands Hospital Corp. v. District 1199, C.A. No. 86-6227 (Dec. 18, 1987) 2, 3
Industrial Mutual Ass'n v. Amalgamated Workers, 725 F.2d 406, 410 (6th Cir. 1984) 5
Paperworkers v. Misco, —— U.S. ——, 56 L.W. 4011 (Dec. 1, 1987) ..... *passim*
Sears, Roebuck & Co. v. Teamsters Local 243, 683 F.2d 154 (6th Cir. 1982) 5
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960) 6, 7
Timken Co. v. Steelworkers, 492 F.2d 1178 (6th Cir. 1974) 4-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-462

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF FOR PETITIONER

---

1. Respondent does not confront the basic point of our petition: that there is a deep, longstanding conflict regarding the scope of judicial review of labor arbitration awards between the decision below (and like decisions of the Sixth and Tenth Circuits) and the decisions we cited of the Third, Fifth, Seventh and Eighth Circuits. Rather it is respondent's position that because this conflict predates this Court's decision in *Paperworkers v. Misco,*

—— U.S. ——, 56 L.W. 4011 (Dec. 1, 1987), review by this Court at this time would be "premature," Resp. Br. at 8. That evasion avails Respondent nothing.

Misco teaches that

> as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. [56 L.W. 4014]

Thus, as even the First Circuit has acknowledged, *Misco* "reaffirm[s] *in language stronger than previously used,* that matters of contract interpretation are typically up to the arbitrator," *Berklee College of Music v. Berklee Chapter of the Mass. Federation of Teachers,* 858 F.2d 31, 32 (1st Cir. 1988) (emphasis added).

Nonetheless, the decision below indicates that those courts which have adopted an expansive view of the scope of judicial authority to review arbitral awards will not be daunted by *Misco.* The First Circuit, after *Misco,* will continue to examine labor agreements for itself to "see if the contract [i]s ambiguous," Pet. App. 24a, and that court will overturn arbitral awards where "[w]e disagree that [the contract] [i]s . . . ambiguous," Pet. App. 17a. Thus it is the First Circuit's view that the authority of labor arbitrations is confined to construing collective bargaining agreements that a *court* regards as ambiguous; where an arbitral award is inconsistent with the court's understanding of "the contract's unambiguous language," says the First Circuit, it cannot be said that the arbitrator even "arguably construe[ed] or appl[ied] the contract." Pet. App. 11a.

The Sixth Circuit, post-*Misco,* has followed the same path as the decision below. In *Highlands Hospital Corp. v. District 1199,* C.A. No. 86-6227 (Dec. 18, 1987), the Sixth Circuit overturned an arbitrator's ruling that an employee who had failed to comply with "the highest

standards of professional competence" was discharged without just cause. The court concluded that because the contract left it to the employer to decide upon the punishment for violations of professional standards, the contract "unambiguously" permitted discharge even where, as the arbitrator had found, the employer's violation was not the true basis for the disciplinary action. The Sixth Circuit thus rejected the arbitrator's interpretation that the "professional standards" clause of the contract applied only to discharges motivated by a breach of such standards. *See also Communications Workers v. United Inter-Mountain Telephone Co.*, C.A. No. 87-5701 (April 25, 1988), *petition for cert. filed*, No. 88-463.[1]

The theory of judicial review of arbitral awards reaffirmed in the decision below and in *Highlands Hospital*, is, to put it most gently, difficult to reconcile with *Misco*'s holding and rationale. Thus, there is no real doubt that the conflict which predated *Misco* will continue. *Misco*, as we have seen, emphasizes the broad authority of arbitrators in interpreting collective bargaining agreements. It is, therefore, nothing short of inconceivable that *Misco* will result in more activist review by those appellate courts which over the years quite properly have deferred to arbitral interpretations in so-called "plain language" cases.

2. The respondent in No. 88-463, *Communications Workers of America v. United Inter-Mountain Telephone Co.*, which was filed in tandem with the instant petition, denies the existence of even a pre-*Misco* circuit conflict. Significantly, however, United Inter-Mountain makes no attempt to reconcile the decisions we cited in our petition

---

[1] Respondent observes that *Highlands Hospital* was decided "only eighteen days after this Court decided *Misco*" and that "the *Highlands Hospital* majority did not cite *Misco*." Resp. Br. at 10-11 n.6. Respondent neglects to point out, however, that the *dissenting opinion* in *Highlands Hospital* argued that the majority decision was inconsistent with *Misco*, and that the majority was unmoved by the dissent's reliance on *Misco*.

with the decisions below or with the decisions on which the First Circuit relied.

Instead, United Inter-Mountain points to *other* decisions by the Fifth, Seventh and Eighth circuits which are said to be consistent with the decision below (and hence inconsistent with the decision by those courts on which we relied). *See* Resp. Br. in No. 88-463 at 15. And United Inter-Mountain also cites decisions of the Sixth Circuit which are said to be inconsistent with the decision below (and hence with the Sixth Circuit case law on which the First Circuit relied). *See id.* at 13-15.

The decisions United Inter-Mountain cites establish nothing more than that those courts which have adopted an activist standard of review of arbitral awards sometimes uphold such awards under that standard, while those courts which have adopted a deferential standard sometimes overturn arbitral awards notwithstanding the deference afforded arbitrators. Thus, for example, the Sixth Circuit cases United Inter-Mountain cites in no way question or limit that Circuit's rule that an arbitration award fails to draw its essence from the contract whenever

> (1) an award conflicts with express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement . . . [*Dobbs Inc. v. Local 614, International Brotherhood of Teamsters*, 813 F.2d 85, 86 (6th Cir. 1987).] [2]

---

[2] The Sixth Circuit cases United Inter-Mountain cites, while sustaining particular arbitral awards, do so on the ground that "If a collective bargaining agreement is *unclear and ambiguous* in its terms, its construction should normally be determined by the arbitrator," *Timken Co. v. Steelworkers*, 492 F.2d 1178, 1180 (6th

Similarly with the possible exception of *Electrical Workers v. Litton*, 704 F.2d 393, 399-400 (8th Cir. 1983), the cases United Inter-Mountain cites from the other circuits do not depart from those courts' holding that

> [D]espite contrary intimations in [the Sixth Circuit's] decision in *Sears, Roebuck & Co. v. Teamsters Local 243*, 683 F.2d 154, 156 (6th Cir. 1982), there is no rule that an arbitrator in order to find an implied condition, must first find the language of the contract to be ambiguous. Although a literal reading of the contract in this case would preclude the implied condition the arbitrator found, he was not obligated to read the contract literally. [*Ethyl Corp. v. Steelworkers*, 768 F.2d 780, 186 (7th Cir. 1985).] [3]

Moreover, even if United Inter-Mountain were correct in claiming that the Sixth Circuit occasionally has deviated from the rule set out in *Dobbs* or that the Third, Seventh and Eighth Circuits have deviated from the rule of *Ethyl Corp.*, it would follow that the disarray among the courts of appeals is even *more* profound than we have claimed and that within any given circuit decisions vary based on the identity of the panel reviewing an arbitral

---

Cir. 1974) (emphasis added), *cited in* Br. for Resp. in No. 88-463 at 13-15. Moreover, United Inter-Mountain's selection of Sixth Circuit cases reaffirm that "the corollary is also true; an arbitrator is bound by the plain and unambiguous provisions of an agreement," as those provisions are interpreted by the court, *see Ford Motor Co. v. Plant Protection Ass'n*, 776 F.2d 69, 74 (6th Cir. 1985); *see also Industrial Mutual Ass'n v. Amalgamated Workers*, 725 F.2d 406, 410 (6th Cir. 1984) (distinguishing cases in which "the arbitrator ignored clear and unambiguous language").

[3] It is also worth noting that none of the cases United Inter-Mountain cites involves the precise issue posed in all of the cases discussed in our petition, *viz.*, whether a provision in a collective bargaining agreement defining certain conduct as "dischargeable" necessarily grants the employer unfettered and unreviewable discretion to decide whether to discharge an employee who has engaged in such conduct. Thus, Inter-Mountain's cases do not detract from our showing of a 4-3 circuit conflict on this important and recurring issue.

award. Thus, *Inter-Mountain*'s showing of intra-circuit conflicts, if credited, would *add to* rather than detract from the reasons for granting a writ of certiorari in this case.

3. In our petition we suggested that, in light of *Misco*, this case may be an appropriate one for summary reversal. Respondent's attempt to defend the decisions below on the merits adds force to that suggestion.

According to the respondent, the decisions below proceed from the premise that just as the courts are to determine *whether* a grievance is arbitrable, *see Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960), so, too, "it is for the courts to enforce limitations on the scope of arbitral authority" with respect to grievances the parties have indisputably agreed to submit to arbitration. Resp. Br. at 14 n.9. From that premise respondent contends that "*Petitioner errs in assuming federal courts owe any particular deference to the arbitrators' determinations that it was within the scope of their authority to review S.D. Warren's decision to discharge its employees* once the arbitrators found that the employees had violated the workplace drug and alcohol rule." *Id.* (emphasis added). And consistent with that view respondent states that the question posed by the decision below is

> Whether the scope of arbitral authority is unrestricted by the express language of a collective bargaining agreement reserving to management the "sole right . . . to discharge employees for proper cause," and providing that violation of a workplace drug and alcohol rule is "cause for discharge," where an arbitrator finds that employees subject to discipline in fact violated the workplace drug and alcohol rule? [Resp. Br. at i.]

The proposition that the rule of *Warrior & Gulf*—which permits courts to decide whether a dispute is arbitrable—extends to straight questions of contract inter-

pretation is plainly wrong. The very reason for the *Warrior & Gulf* rule is that because the arbitrator has plenary authority to decide such contract questions, *see* 363 U.S. at 581-82, it is appropriate for the courts to assure in the first instance that the parties provided for arbitration. Thus, as the Court stated in *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 651 (1986), "If the Court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration."

Here there is no doubt that the arbitrators had jurisdiction to decide in the *Warrior & Gulf* sense. And, for the reasons we have given, it follows that *Misco* governs and that the decision below should be reversed.

CONCLUSION

For the foregoing reasons, and those stated in our petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

MARK BROOKS
(Counsel of Record)
UNITED PAPERWORKERS
INTERNATIONAL UNION
P.O. Box 1475
Nashville, Tennessee 37202
(615) 834-8590

LAURENCE GOLD
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
STEPHEN P. SUNENBLICK
P.O. Box 7060, DTS
97 India Street
Portland, Maine 04112